Equitable Life Assurance Society *and* District 925, Service Employees International Union. Case 3-CA-11132

May 4, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a charge filed on July 23, 1982, by District 925, Service Employees International Union, herein called the Union, and duly served on Equitable Life Assurance Society, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint on August 30, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 25, 1982, following a Board election in Case 3-RC-8197, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about July 19, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. The complaint further alleges that, since on or about July 19, 1982, Respondent has failed and refused to supply information requested by the Union which is necessary for and relevant to the Union's performance of its function as the exclusive bargaining representative of the unit employees. On September 10, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint and setting forth several affirmative defenses.

On November 1, 1982, counsel for the General Counsel filed directly with the Board a "Motion To Strike Affirmative Defenses and for Summary Judgment." Subsequently, on November 22, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an affidavit in opposition to the General Counsel's motion to strike affirmative defenses and for summary judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits certain factual allegations of the complaint, but denies that it committed the unfair labor practices alleged and attacks the validity of the Union's certification on the grounds that the Board erred in overruling its objections to the election in the underlying representation case. Respondent asserts as affirmative defenses (1) that its exceptions to the Regional Director's Report on Objections raised material and substantial issues of fact and the Board's failure to order a hearing to resolve those factual issues violated its rules and regulations and constituted an abuse of discretion; (2) that the Regional Director relied on language contained in a union authorization card in overruling Respondent's objection that the Union was not a labor organization within the meaning of the Act, but did not submit the card to the Board with his report, so that the Board abused its discretion in overruling Respondent's objection without reviewing the entire record on which the Regional Director relied; (3) that the Union is not a labor organization within the meaning of the Act; (4) that the Union by letter dated July 2, 1982, demanded information for bargaining, some of which Respondent is not obligated to provide; and (5) that the Board's certification is invalid because, at the time of the certification, the Board had not been apprised of the scope of the Region's investigation of objections and Respondent was, in effect, precluded from discovering the scope of the investigation and bringing any deficiencies to the attention of the Board, thereby denying Respondent the opportunity to supplement the materials submitted by the Regional Director with his report and assure that a full and complete investigation record was before the Board.

Respondent in its opposition to the General Counsel's motion to strike affirmative defenses and for summary judgment additionally asserts that it has been precluded, by the Regional Director's denial of its request for information about the

[1] Official notice is taken of the record in the representation proceeding, Case 3-RC-8197, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Board's investigation, from learning whether the Region made any contact with, or took statements from, the Union or eligible voters in the course of investigating the Employer's objections; that the Regional Director failed to provide it with a copy of the union authorization card or a transcription of the language appearing thereon (except any employee name) upon which the Regional Director relied in finding that the Union is a labor organization within the meaning of the Act; and that questions of fact exist with respect to whether the Union is entitled to certain EEO and affirmative action data, as well as other confidential management information. Respondent asserts that an evidentiary hearing is required to resolve those questions. Respondent further asserts that the Union, subsequent to its certification, admitted that it had engaged in a campaign to convince eligible voters that the Employer's consultant subjected employees to fear tactics, psychological pressure, and brainwashing, as alleged in Respondent's election objections. Respondent attached to its opposition a copy of an undated document entitled "Fact Sheet on Equitable Life Assurance" which it claims constitutes newly discovered evidence with respect to this objection. We have reviewed the entire record herein and, with the exception of its position with respect to certain of the information requested by the Union, find no merit to Respondent's various contentions.

A review of the record, including that of the representation proceeding, Case 3-RC-8197, indicates that the Union won the election conducted on February 4, 1982, pursuant to a Stipulation for Certification Upon Consent Election. The Employer, Respondent herein, filed timely objections to conduct affecting the results of the election, alleging that the Union engaged in a campaign of deliberate misrepresentation of material facts that the Union claimed to be a labor organization when in fact it has no collective-bargaining contracts, no dues-paying members (other than union officials), and has not filed forms and documents with the Department of Labor, and that the Union provided employees with parties, lunches, and other benefits in order to induce them to vote for it. After investigation, during which both parties were afforded the opportunity to present evidence, the Regional Director issued, on March 8, 1982, his Report on Objections in which he concluded, *inter alia*, that any alleged misrepresentations were made at times which permitted the Employer adequate time to respond, that the Union did not exceed the bounds of permissible campaign propaganda, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, he recommended that the objections be overruled and the Union certified.

Respondent thereafter filed exceptions to the Regional Director's report, along with a supporting brief. On June 25, 1982, the Board, after reviewing the record in the light of Respondent's exceptions and brief, adopted the Regional Director's findings and recommendations and certified the Union.

In the instant proceeding Respondent is attempting to relitigate matters which were or could have been heard and determined in the representation proceeding. Thus, Respondent's assertions regarding alleged misrepresentations precluding a free voter choice were previously considered by the Board and rejected. While Respondent claims that the Board abused its discretion in failing to order a hearing on these matters, it has raised no substantial or material factual questions which would require a hearing for resolution, but, rather, takes issue with the legal conclusions drawn from the facts. With respect to Respondent's contentions that it was unable to supplement the record before the Board because it was denied information as to the scope of the Regional Director's investigation, it is well settled that a party has no right to investigatory affidavits or the identity of witnesses in proceedings before the Board. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); see also *Frontier Hotel*, 265 NLRB 343 (1982). As to Respondent's contention that the Regional Director failed to append to his report a copy of the Union's authorization card, upon which he relied in concluding that it is a labor organization, we note that Respondent's election objections and exceptions to the Regional Director's report related to its allegation that the Union misrepresented to employees that it is a labor organization when it has no collective-bargaining contracts and no dues-paying members and has not filed with the United States Department of Labor the forms and documents required by law. These factors are not, however, relevant to a finding of labor organization status within the meaning of the National Labor Relations Act. See, e.g., *Meijer Supermarkets*, 142 NLRB 513 fn. 3 (1963). Further, Respondent has previously acknowledged the Union's labor organization status in entering into a Stipulation for Certification Upon Consent Election agreement on December 3, 1981,[2] and the record contains ample documentary evidence other than a union authorization card to support the Regional Director's finding that the Union is a labor organization.

It is well settled that in the absence of newly discovered or previously unavailable evidence or spe-

[2] See *Hospice of Alverne*, 195 NLRB 313 (1972).

cial circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding concerning the Union's certification, and hence Respondent's bargaining obligation, were or could have been litigated in the prior representation proceeding. While Respondent proffers as newly discovered evidence a copy of an undated document which it asserts establishes that the Union did engage in a campaign to convince eligible voters that Respondent's consultant would subject employees to fear tactics, psychological pressure, and brainwashing, that document represents no more than cumulative additional evidence regarding issues already decided. Nor does Respondent allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding concerning those issues.

The Union, by letter dated July 2, 1982, requested from Respondent the following information: the names, home addresses, dates of hire, present salary and salary at date of hire, grade levels and job descriptions of all employees presently in the bargaining unit; complete descriptions of all employee benefits including insurance plans, pension plans, profit-sharing plans, and any others available to members of the bargaining unit; copies of all office policies, procedures, and rules affecting members of the bargaining unit; descriptions of wage and salary structures for the bargaining unit; descriptions of productivity requirements, and the criteria and methods used to determine wage increases, changes in grade level and promotions; copies of Equitable's affirmative action plan, including all EEO data. The General Counsel alleges in the complaint that this information is necessary for and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the unit employees. Respondent in its answer to the complaint admits the information request, but denies the necessity for and relevance of some but not all of the information. In its affidavit in opposition to the General Counsel's motion it additionally asserts that questions of fact exist at least as to whether the Union is entitled to certain EEO and affirmative action data, as well as other unspecified confidential management information, and that an evidentiary hearing is required to resolve those questions.

[3] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

It is well established that most of the information requested by the Union is presumptively relevant for purposes of collective bargaining and must be furnished upon request.[4] Nor did Respondent raise issues of relevance or lack of necessity in denying the Union's information request. An employer's affirmative action plan is not, however, presumptively relevant, except for certain statistics contained in the "Work Force Analysis" portion of such a plan.[5] The Union here has requested "copies of Equitable's Affirmative Action plan, including all EEO data." While the Union is not entitled to Respondent's entire affirmative action plan without demonstrating relevance, it is entitled to the requested EEO data included in the statistical portion of that plan. Accordingly, since all the information requested by the Union, except for copies of Equitable's affirmative action plan other than the EEO data, is presumptively relevant, and since no material issues of fact exist with respect to Respondent's refusal to furnish any of the information sought, we grant the General Counsel's Motion for Summary Judgment except as it relates to the Union's request for the affirmative action plan other than the EEO data.[6] Insofar as it does relate to Respondent's failure to furnish the Union with portions of its affirmative action plan other than the EEO data contained therein, the General Counsel's Motion for Summary Judgment is denied.[7]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New York State corporation engaged in the sale and service of health benefit and life policies. During the past year, it derived revenues in excess of $1 million of which more than $50,000 was derived from sales to customers located in States other than the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material

[4] *Edmonds Villa Care Center*, 249 NLRB 705 (1980); *White Farm Equipment Co.*, 242 NLRB 1373 (1979); *Dynamic Machine Co.*, 221 NLRB 1140 (1975).

[5] *Minnesota Mining and Mfg. Co.*, 261 NLRB 27 (1982); *Westinghouse Electric Corp.*, 239 NLRB 106 (1978).

[6] Member Jenkins would find Respondent's entire affirmative action plan to be presumptively relevant, and therefore dissents from the majority's failure to find the Union entitled to the affirmative action plan requested. See his separate opinion in *Minnesota Mining and Mfg. Co.*, above, concurring in part and dissenting in part. Member Hunter, as set forth in his separate concurrence in *Minnesota Mining and Mfg. Co.*, would not find the statistical portion of an affirmative action plan to be presumptively relevant. He therefore dissents from the majority's grant of summary judgment with respect to the EEO data contained in its affirmative action plan.

[7] In light of the above, we find it unnecessary to pass on the General Counsel's motion to strike affirmative defenses.

herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

District 925, Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office and clerical employees at the Employer's Syracuse, New York, Group Benefit Office; excluding guards, professional employees, confidential employees, supervisors as defined in the Act, office managers, managers and assistant managers.

2. The certification

On February 4, 1982, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 3, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on June 25, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 2, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 19, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit. Further, the Union has requested that Respondent supply it with certain information necessary for and relevant to the performance of its function as the exclusive bargaining representative of the unit employees. Since on or about July 19, 1982, Respondent has failed and refused to supply the Union with any of the requested information.

Accordingly, we find that Respondent has, since July 19, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and to provide it with certain requested relevant information, and that, by such refusals, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate and, if an understanding is reached, embody such understanding in a signed agreement. We shall also order Respondent, upon request, to supply the Union with information which is necessary and relevant to the Union's performance of its function as the exclusive representative of the unit employees.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Equitable Life Assurance Society is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 925, Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time office and clerical employees at the Employer's Syracuse, New York, Group Benefit Office; excluding guards, professional employees, confidential employees, supervisors as defined in the Act, office managers, managers and assistant managers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 25, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 19, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing since on or about July 19, 1982, to supply information requested by the Union which is necessary for and relevant to the Union's performance of its function as the exclusive bargaining representative of the unit employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Equitable Life Assurance Society, Syracuse, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 925, Service Employees International Union, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time office and clerical employees at the Employer's Syracuse, New York, Group Benefit Office; excluding guards, professional employees, confidential employees, supervisors as defined in the Act, office managers, managers and assistant managers.

(b) Refusing to supply the aforesaid labor organization with information necessary for collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, supply the above-named labor organization with information necessary for collective bargaining.

(c) Post at its Syracuse, New York, Group Benefit Office copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been been taken to comply herewith.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 925, Service Employees International Union, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply the above-named Union with information necessary for collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time office and clerical employees at the Employer's Syracuse, New York, Group Benefit Office; excluding guards, professional employees, confidential employees, supervisors as defined in the Act, office managers, managers and assistant managers.

WE WILL, upon request, supply the above-named Union with information necessary for collective bargaining.

EQUITABLE LIFE ASSURANCE SOCIETY